Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WILLIAM FLOYD "DUB" TURNER, ELAINE DODD AND MALCOLM ATWOOD,

Petitioners,

v.

JAMES A. WORRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *Pickering* balancing test should apply to a situation where the Respondent Worrell was not an employee or contractor with the OBNDD, the entity that allegedly retaliated against the plaintiff because of the exercise of First Amendment rights, but where Worrell would have had a relationship with the OBNDD that would be analogous to an employment relationship.

2. Whether the OBNDD's refusal to work with Worrell in connection with enforcement of drug laws and the conducting of confidential investigations constituted actionable retaliation under 42 U.S.C. § 1983.

3. Whether a claim under 42 U.S.C. § 1983 should exist for the OBNDD's actions of "refusing to cooperate" with Worrell, and whether "refusing to cooperate" by a state actor should be actionable under 42 U.S.C. § 1983.

4. Whether OBNDD director, former director and supervisor were entitled to qualified immunity, where a relationship between Worrell and OBNDD would have existed that was sufficiently analogous to an employment relationship, and where the Tenth Circuit held that the *Pickering* balancing test would not apply in a First Amendment retaliation case.

5. Whether there should be a cause of action under 42 U.S.C. § 1983 for a "bad faith investigation."

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM FLOYD "DUB" TURNER, ELAINE DODD, and MALCOLM ATWOOD,	)	
Petitioners,	)	
v.	)	No. _____
JAMES A. WORRELL,	)	
Respondent.	)	

PETITION FOR A WRIT OF CERTIORARI

William Floyd "Dub" Turner, Elaine Dodd, and Malcolm Atwood, of the Oklahoma State Bureau of Narcotics and Dangerous Drugs ("OBNDD Defendants"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-39a) is reported at 219 F.3d 1197. The opinion of the district court (App. B, *infra*, 40a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2000. The Petitioners' petition for rehearing was denied on January 10, 2001. (App. C, *infra*, 52a-53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

The Respondent James A. Worrell, an applicant for the position of Director of the District Attorneys' Drug Task Force ("Drug Task Force") in a district attorney's district that covered five counties in southern Oklahoma, filed a 42 U.S.C. § 1983 action against three administrators of the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD). Worrell sued the current Director of the OBNDD, Petitioner Atwood; the immediate past Director of the OBNDD, Petitioner Dodd; and the agent in charge of the Ardmore OBNDD district office, Petitioner Turner. Turner's region included the southern ten counties of Oklahoma.

Respondent Worrell had previously been legal counsel for the FBI, but had retired. After his retirement from the FBI, Worrell testified in the punishment stage of a state criminal murder trial in 1986 as an expert witness on behalf of a defendant, Ellis, who had murdered an OBNDD agent with sawed-off shotgun during a drug

arrest.[1] Worrell testified that the murdered OBNDD agent had used an improper procedure in approaching his murderer, and this had contributed to the agent's death. At that time, the prosecution called as a witness an FBI agent who contradicted what Worrell had testified to. Nine years later, in the spring of 1995, the District Attorney of the five county District Attorney's district, Gary Henry,[2] offered Worrell the position of Drug Task Force Director of Henry's five county district.

Prior to Henry's job offer to Worrell, the OBNDD had advised Henry that the Drug Task Force could be housed in the OBNDD Ardmore office. There is no requirement under state law that the OBNDD house this Drug Task Force, or any other. The Ardmore OBNDD office is at a secret location, and the sign on the door is that of a fictitious business in order to maintain the confidentiality of OBNDD operations. (ER[3] at 60; 101).

When word spread that Worrell was to be named the Drug Task Force director, a local FBI agent, Jim Supan, reminded Petitioner Turner, the agent in charge of the OBNDD Ardmore office, that Worrell had previously testified on behalf of the person who had murdered an OBNDD agent. Another local FBI agent,

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[1] *Ellis v. State of Oklahoma*, No. F-86-676, slip op. (Okla. Crim. App. 1990), *after remand*, *State v. Ellis*, 834 P.2d 985 (Okla. Crim. App. 1992).

[2] Henry was a defendant in the case below. The district court granted his motion for summary judgment, and that order was affirmed on appeal by the Tenth Circuit in this case. (App. A, *infra*, 18a-24a).

[3] "ER" refers to excerpts of the district court record that were filed with the Tenth Circuit. This was referred to as the Appellant's Appendix in the Tenth Circuit.

Scott Chaffin, told Turner that he thought that Worrell had lied in his testimony at the Ellis trial; that Worrell was "nuts" and "crazy"; that other FBI agents were afraid of Worrell; that FBI agents didn't want anything to do with him, and didn't want him around. (ER at 102; 116-117; 120-121; 127-128).

Turner testified in his deposition that Worrell had been seen in the parking lot of the secret OBNDD location, writing down license plate numbers. The FBI told Turner that Worrell had engaged in this type of activity when Worrell was with the FBI. (ER at 121-122; 127). Turner's deposition was submitted in support of the OBNDD Defendants' motion for summary judgment.

The position of Director of the District Attorney's Drug Task Force was one of the most confidential and sensitive in drug enforcement. (ER at 101). As the Director of the Drug Task Force, Worrell would office in the OBNDD office, and would have had total access to all OBNDD files. (ER at 101-102).

In support of his motion for summary judgment that was filed with the district court, Turner also submitted an affidavit stating that the employment of Worrell, who had testified on behalf of a person who was convicted of drug distribution and of the murder of an OBNDD agent who was enforcing the drug laws of this State, would have been disruptive of the OBNDD's operations in the Ardmore office. (ER at 101-102). In his affidavit, and in his deposition, Turner also stated that he had been advised by two FBI agents of the unreliable and erratic behavior of Worrell. (ER at 101-102; 116-117; 120-121; 127-128). Also, Turner also stated in his affidavit that there were many law enforcement officers who greatly resented Worrell for what he had done, and who would have refused to work with him. Turner testified in his deposition that he could not trust Worrell.

Because of the information he had received, Turner telephoned Petitioners Dodd, the Director of OBNDD, and Atwood, the second in command at OBNDD (who was the Director of OBNDD when this lawsuit was filed). Turner asked Dodd and Atwood if he was required to work with Worrell. Dodd and Atwood told Turner that he did not have to work with anyone he did not trust.

After having conferred with Atwood and Dodd, Turner told District Attorney Henry that the OBNDD would not work with Worrell, and would not allow him to be housed with the OBNDD. (ER at 102; 117-118). Henry then withdrew the job offer from Worrell.

Respondent Worrell sued Turner, Atwood, and Dodd in the United States District Court for the Western District of Oklahoma, pursuant to 42 U.S.C. § 1983. The district court granted the motions for summary judgment of Turner, Dodd, Atwood and Henry in an order dated March 31, 1998. (App. B, *infra*, 40a-51a). The district court applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in reaching its decision. (App. B, *infra*, 47a-51a).

Worrell appealed this order to the United States Court of Appeals for the Tenth Circuit. On July 26, 2000, that court issued a published opinion, *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000). The court held that Petitioners Atwood, Turner and Dodd could be sued by Worrell pursuant to 42 U.S.C. § 1983, for retaliation, in violation of the First Amendment, by "withholding cooperation" or for "refusing to cooperate" with Respondent Worrell. (App. A *infra*, 27a-28a; 38a).

The Tenth Circuit also held that while the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), applied with

regard to Henry, the District Attorney, the test would not be applied with regard to Atwood, Turner and Dodd, "because the *Pickering* balancing test has not been applied to individuals who are neither the plaintiff's employer nor parties to a contract with him, ..." (App. A, *infra*, 3a). The Tenth Circuit held that in cases where allegations of retaliatory conduct are directed toward a defendant who is not the plaintiff's employer, and where there is no contractual relationship between them, a different test would be applied. (App. A, *infra*, 24a-32a). The Tenth Circuit held that a test devised by the Eighth Circuit in *Helvey v. City of Maplewood*, 154 F.3d 841 (8th Cir. 1998) would apply. Although this test had never been previously applied by the Tenth Circuit, and despite the fact that *Helvey* was decided after the actions that occurred (in the spring of 1995) in the present case, the Tenth Circuit held that Petitioner Turner was not entitled to qualified immunity. (App. A, *infra*, 36a-39a). With regard to the present and former Directors of OBNDD, Petitioners Atwood and Dodd, who had merely told Turner that he did not have to work with anyone who he did not trust, the Tenth Circuit remanded the case to the district court to determine whether Atwood and Dodd's personal participation was sufficient to support a 42 U.S.C. § 1983 claim against them. (App. A, *infra*, 52a-53a).

On January 10, 2001, the Tenth Circuit denied the OBNDD Defendants' Petition for Rehearing. (App. C, *infra*, 52a-53a).

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *BOARD OF COUNTY COMMISSIONERS V. UMBEHR* AND *O'HARE TRUCK SERVICE V. CITY OF NORTHLAKE*, BECAUSE IN THOSE DECISIONS, WHICH INVOLVED ALLEGED RETALIATION BASED ON THE EXERCISE OF FIRST AMENDMENT RIGHTS BY NON-EMPLOYEES, THE SUPREME COURT APPLIED THE *PICKERING* BALANCING TEST; IN THE PRESENT CASE, THE SITUATION INVOLVING THE OBNDD AND WORRELL, AND WOULD HAVE BEEN HOUSED WITH THE OBNDD, AND WOULD HAVE HAD ACCESS TO THE OBNDD'S CONFIDENTIAL DRUG ENFORCEMENT INFORMATION, WAS SUFFICIENTLY ANALOGOUS TO AN EMPLOYMENT SITUATION THAT THE *PICKERING* BALANCING TEST SHOULD HAVE BEEN APPLIED.

The present case involves questions of exceptional public importance. In this case, the Tenth Circuit held that a law enforcement agency, which has been sued under 42 U.S.C. § 1983 for allegedly retaliating against a non-employee or contractor in violation of the First Amendment could be held liable under 42 U.S.C. § 1983 for "withholding cooperation" or "refusing to cooperate" or if they "would not cooperate" with a local District Attorney's Drug Task Force, because the proposed director of the Task Force was to be Worrell. (App. A, *infra*, 27a-28a; 38a).

This case is also important because the Tenth Circuit held that the OBNDD Defendants were not entitled to the benefit of the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in the defense of the § 1983 lawsuit brought

against them. The Tenth Circuit's decision is therefore inconsistent with the decisions of this Court in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 673 (1996) and *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 719 (1996), where it was held that the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), should be applied with regard to contractors, as well as employers. *See also Khuans v. School District 110*, 123 F.3d 1010, 1018 (7th Cir. 1997) (noting that after *Umbehr*, the *Pickering* balancing test applies to independent contractors).

In *Worrell*, the Tenth Circuit stated that one of the reasons why an employer (as opposed to the OBNDD in this case) is protected by a *Pickering* analysis is because he or she will have "first-hand knowledge of the degree of disruption caused by the plaintiff's speech and its effects on the functioning of the agency." (App. A, *infra*, 27a). However, the OBNDD contends that because Worrell would be housed on the OBNDD premises, and would have access to all of their confidential files, Turner and the OBNDD supervisors and agents would have this same first-hand knowledge. Therefore, Worrell's presence on the OBNDD's premises would have the same potentially disruptive effect as if Worrell were an OBNDD employee, and the *Pickering* test should have been applied.

The Tenth Circuit also stated that "[b]ecause a nonemployer defendant works for another agency, he or she may be able to avoid the effects of the disruption caused by the withdrawal of cooperation." (App. A, *infra*, 28a). However, avoiding possible disruption would be impossible for the OBNDD in the present case because of the fact that the Drug Task Force was to be housed with the OBNDD. Surely Worrell had no First Amendment right to be present on OBNDD premises. And the OBNDD had the right to exclude from its office, and from its informants' files, someone it believed to be untrustworthy, and whose presence would interfere

with its operations.

The Fifth Circuit has held that the *Pickering* test is to be applied in a case where the relationship between the plaintiff and defendant was "sufficiently analogous" to a public employment relationship. *Blackburn v. City of Marshall*, 42 F.3d 925, 934 (5th Cir. 1995). *See also Copsey v. Swearingen*, 36 F.3d 1336, 1343-45 (5th Cir. 1994) (blind vendor's license to be at state capitol vending facility was governed by *Pickering/Connick* test where vendor was more like an employee than a public citizen); *Havekost v. United States Department of the Navy*, 925 F.3d 316, 317-20 (9th Cir. 1991)[4] (grocery sacker who had permission to work at naval commissary for customer tips was a licensee, and navy had right to have *Pickering/Connick* analysis applied); and *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1381 (8th Cir. 1989) (*Pickering/Connick* was properly applied in case regarding surgeon staff privileges because of right of public hospital to regulate its medical staff in order to insure the delivery of adequate medical care to it patients). The present case shows that Worrell's relationship to the OBNDD would have also been "sufficiently analogous" to a public employment relationship to cause the *Pickering* balancing test to be applied.

If the *Pickering* test had been applied, the interests of the OBNDD would have outweighed Worrell's interest. If the Tenth Circuit's decision is allowed to stand, the OBNDD would not have authority to exclude from its premises, and from its most sensitive files, someone whom even the FBI had regarded as "nuts" and "crazy," was afraid of, and didn't want anything to do with. To have someone in the OBNDD's office whom the OBNDD could not

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[4]This case was discussed in *O'Hare*, 518 U.S. at 722.

trust would be disastrous for the enforcement of drug laws and the carrying out of undercover operations. Law enforcement at all levels must be free to decide who they will (and won't) work with. Given the clandestine and secretive nature of drug investigations and the violent nature of the drug trade itself, supervisors such as Turner, Atwood and Dodd have the duty and the right to tightly control who is to have access to the sensitive infrastructure of the Bureau.

In the present case, the Tenth Circuit's holding that there was a factual issue for the jury about whether Turner "caused" the withdrawal of the job offer to Worrell, was not supported by the record. (App. A, *infra*, 33a). Turner did not demand or cause Worrell's non-hiring as Drug Task Force Director. Turner merely stated that they would not cooperate with Worrell if he was the Director, or allow him to be housed with them or have access to their files. As was noted previously, there is no requirement under federal or state law that the OBNDD house any Drug Task Force. And the Drug Task Force was free to operate whether or not OBNDD cooperated with Worrell, or allowed him to be on OBNDD premises. The OBNDD contends that it must be free to choose with whom it will work and with whom it will share confidential information, in the dangerous world of narcotics enforcement.

In support of his motion for summary judgment, Turner submitted an affidavit to the district court stating that the employment of Worrell, who had testified on behalf of a person who was convicted of drug distribution and the murder of a OBNDD agent who was enforcing the drug laws of Oklahoma, would have been disruptive of the OBNDD's operations in the Ardmore office, and, because Worrell would have had total access to all OBNDD files, disruptive of the operations of the entire

OBNDD. Turner's affidavit stated that there were many law enforcement officers who greatly resented Worrell for what he did, and who would have refused to work with him.

This type of potentially disruptive situation has repeatedly been recognized as a reason, under the *Pickering* test, for the exclusion of an employee who would be the origin of such a problem. This is true, of course, even if the reason why the employee has been discharged was because of the exercise of her First Amendment rights. For example, in *Tedder v. Norman*, 167 F.3d 1213 (8th Cir. 1999), the Eighth Circuit held that the demotion of the deputy director of state law enforcement officer training academy for giving deposition testimony that a county sheriff's used excessive force did not violate the First Amendment. This was because of the state's interest in the effect on discipline, harmony among co-workers, working relationships requiring loyalty and confidence, the performance of the speaker's duties, or the regularity of the operation of the enterprise. *See also Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000) (applying *Pickering* test and noting that in a law enforcement agency, "there is a heightened need for order, loyalty, morale and harmony); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1199-1202 (9th Cir. 2000) (applying *Connick v. Myers*, 461 U.S. 138 (1983), and noting that a police department is a quasi-military organization, and discipline and esprit de corps are vital to its functioning); and *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 887-89 (3d Cir. 1997) (*Pickering* balancing was used to determine that public housing authority's police department's interest in fostering trust and confidence among its officers and other law enforcement drug units outweighed a police officer's interest in testifying as a character witness for a reputed organized crime associate).

As has been noted, at the time that Turner made the statements

to Henry about the OBNDD's refusal to work with Worrell, Turner had previously been advised by the FBI of Worrell's bizarre, unreliable and erratic behavior. (ER at 102; 116-117; 120-121; 127-128). It would have been irresponsible for Turner to have allowed such a person to have access to all OBNDD confidential files.[5] However, the Tenth Circuit made no mention of the sensitive nature of OBNDD, and the danger that is involved with regard to agents and informants. The murder of the OBNDD agent by the defendant in the *Ellis* trial itself confirms this fact.

The Tenth Circuit held that the district court erred when it applied the test in *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the present scenario. (App. A, *infra*, 3a). However, the Supreme Court in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 673 (1996) and *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 719 (1996) applied the *Pickering* test. And *O'Hare* held that the *Pickering* test also applied to a situation involving one who is a "regular provider of services" to a government entity. 518 U.S. at 714, 717-21.

The Tenth Circuit's decision means that it is probable that no traditional defenses in First Amendment cases in the employment context can be used in the defense of a § 1983 case, even if it involves a situation where the plaintiff's relationship to the governmental entity is "sufficiently analogous" to an employment relationship. This would include the requirement, in public

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[5]While the Tenth Circuit noted that Turner did not read the transcript of the *Ellis* trial, this presupposes that there is some objective level of truth that must exist before Turner would believe that Worrell would be a detriment to the OBNDD's confidentiality. Turner, Atwood and Dodd should be able to rely on the FBI as a source without having to conduct further investigation.

employment cases, that the speech be a matter of public concern, see *Gable v. Lewis*, 201 F.3d 769, 770-72 (6th Cir. 2000) ("public concern" requirement of *Connick* First Amendment employment cases did not apply in case where an automobile towing company operator was not an employee of defendant); or that the position not involve a policymaking or confidential position, see *McEvoy v. Spencer*, 123 F.3d 92, 102 (2d Cir. 1997) (*Pickering* balancing test applies even when a policymaking employee is involved); or, as this case represents, the application of the *Pickering* balancing test.

Exclusion of traditional First Amendment defenses in cases involving alleged retaliation by non-employers or contractors would also seem to be at odds with this Court's decisions in *Texas v. Lesage*, 120 S. Ct. 467, 468 (1999), and *Board of Commissioners v. Umbehr*, 518 U.S. 668, 675 (1996). In these cases this Court held that the government can use the defense of *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), that is, that the same decision would have been made absent the forbidden First Amendment consideration. Significantly, *Lesage* involved a case where the plaintiffs were applicants for admission to a university doctoral program, and, therefore, were not employees, or contractors.

Furthermore, while Worrell was not a contractor with OBNDD, he was a contractor with the Drug Task Force, which was to be housed with, and join investigative forces with, the OBNDD. Surely Worrell's status was sufficiently analogous to that of the contractor in *Umbehr*, whose contract with the governmental entity was not renewed because of the alleged exercise of First Amendment rights.

The refusal to apply a *Pickering* balancing process in cases involving alleged retaliation because of the exercise of First

Amendment rights, in cases that did not involve employees or contractors, but where the situation was analogous to an employment situation, would cause serious problems. For example, if Worrell had made a public speech arguing that heroin should be allowed to be sold in schools, he would obviously have a First Amendment right to make such a speech. However, after the Tenth Circuit's decision in *Worrell*, the OBNDD, the FBI, the DEA and all other law enforcement agencies could be sued on First Amendment principles if they refused to "cooperate" or "assist" or, as in the present case, house Worrell, or allow him access to their confidential files and information.

This would mean that there would be no limit as to who could be sued for alleged retaliation based on First Amendment principles. In his dissent in *Board of County Commissioners v. Umbehr*, 518 U.S. at 696, Justice Scalia predicted that the Court would eventually have to rule on whether "the First Amendment requires the City of Chicago to have as few potholes in Republican wards (if any) as in Democratic ones . . . ." After *Worrell*, it is hard to see why the Tenth Circuit is not already there. *See, e.g., Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (equal protection clause requires town to not discriminate against blacks with regard to furnishing of municipal services such as paved streets). This is particularly true in view of Justice Scalia's suggestion that after *Umbehr*, a white supremist group could not be denied the right to contract with the Department of Housing and Urban Development with regard to providing security in public housing units. 518 U.S. at 700.

In *Worrell*, the Tenth Circuit held that a genuine issue of material fact existed as to whether, when the OBNDD had announced that it would not cooperate with or assist Worrell, this was "retaliation." It would seem that "retaliation" is no different

from "discrimination." Therefore, the Tenth Circuit's decision has turned the First Amendment into an anti-discrimination act. Furthermore, it is the government's duty to constantly take adverse actions against citizens. Any of those acts could be now termed retaliation or discrimination.

Because the First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation, unless their work requires political affiliation or support, see *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), after the Tenth Circuit's decision in *Worrell*, a governor who appoints only Democrats to a position such as a district attorney or judge could be sued under § 1983 for "retaliating" or "discriminating" against Republicans.[6] Additionally, with no limit on what can be termed "retaliation" or discrimination," a plaintiff could also sue a United States Senator of one political party for discriminating against members of another political party with regard to federal appointments, such as United States Attorneys, or federal judges. *See Davis v. Passman*, 442 U.S. 228 (1979) (United States Congressman can be sued personally for damages under the Fifth Amendment for sex discrimination in employment).

The Court's decision would allow plaintiffs to use the First Amendment to claim that whenever the government takes an adverse action against them, they have been "retaliated" against. All that a person would have to do would be to engage in public or private speech; if the government then took any type of action against the citizen, regardless of its motivation, it would be a fact

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[6]Of course, a governor can be sued under 42 U.S.C. § 1983. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990) (governor of Illinois was sued with regard to use of political considerations in hiring, rehiring, transferring and promoting).

question for the jury as to whether this was in retaliation for, or was due to discrimination because of, the exercise of First Amendment rights. For example, a corrupt district attorney who wanted access to the OBNDD's confidential files, or who wanted to thwart an investigation of her, could make a speech criticizing the OBNDD. If the OBNDD then refused to cooperate with, or assist the district attorney (or the district attorney's drug task force director), the district attorney could sue the OBNDD for retaliation because of the district attorney's exercise of First Amendment rights. In the present case, the OBNDD director, former director and an OBNDD supervisor are to face a jury trial for potential damages under 42 U.S.C. § 1983 because of their refusal to allow Worrell on OBNDD premises.

The Tenth Circuit's decision allows plaintiffs to sue the nation's state and local law enforcement agencies, and all state and local governmental entities, for alleged "non-cooperation," or failure to provide "assistance" based on alleged retaliation for the exercise of First Amendment rights. This has no parallel in any case in any other circuit court of appeals in the country.

In a case cited by the Tenth Circuit in *Worrell*, *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999), a plaintiff contended that he was retaliated against when law enforcement officials made public statements that a bomb that was being transported by the plaintiff detonated, and this information later proved to be false. But this was a case where the public officials were also accused of conspiracy to violate rights under § 1983. 192 F.3d at 1300-01. In *Worrell*, the Tenth Circuit also cited *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), where the plaintiff sued a sheriff, claiming he unlawfully released humiliating details of her rape to the public in retaliation for her criticism of him in a newspaper interview. Nothing like what happened in

Mendocino and *Bloch* occurred in the present case; and in *Worrell*, there was no dissemination of anything negative to the public. The only persons who Turner related this information to were the district attorney of that jurisdiction, Gary Henry, and Turner's two supervisors, Petitioners Atwood and Dodd.

The Tenth Circuit held that Turner's statement to District Attorney Henry that Worrell could not be trusted could be considered to be part of Worrell's retaliation claim. (App. A, *infra*, 33a). However, Turner should be free to express sentiments such as to those other involved in law enforcement, such as District Attorney Henry. In cases involving the Fourteenth Amendment, it is universally held that for a liberty interest to be affected, the dissemination of the harmful material must be outside governmental channels. *See, e.g. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 n.13 (1985) ("failure to allege that the reasons for the dismissal were published dooms [the liberty interest] claim."). In the present case, the Tenth Circuit now holds that Turner could not disseminate to other law enforcement agencies the information provided to him by the FBI about Worrell, without being accused of retaliation.

As was noted, in the companion case to *Umbehr*, *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 714-19 (1996), the Court also held that a private entity that is a "regular provider of services" to the government is also entitled to First Amendment protection, and that the *Pickering* balancing test is to be used. There is no reason why *Pickering* should apply to a situation involving a "regular provider of services," or to a contractor, but not to the OBNDD Defendants in this case; the "regular provider of services" and the contractor have no control over the employer decisions, or the operation or management of the governmental organization. If *Pickering* balancing applies to the regular provider

or services and the contractor, it should apply to a governmental entity that houses, or provides access to confidential information to, a potential plaintiff.

In the present case, if a *Pickering* balancing test were used (as the district court did), the OBNDD Defendants would prevail. *See, e.g., Andersen v. McCotter*, 205 F.3d 1214 (10th Cir. 2000)[7] (First Amendment rights of an intern at the department of corrections were violated if she was discharged for criticizing changes in sex-offender program; however, the government's interest in preventing articulated disruption outweighed the intern's First Amendment interests); *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999) (deputy sheriff's first amendment interest in running for sheriff was outweighed by sheriff's interest in effective law enforcement when the sheriff could point to reasonable predictions of disruption if based on specific evidence); and *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988) (en banc) (fire chief's determination that speech would cause dissension and disruption in the fire department, and his discharge of fire fighters for doing such, was entitled to judicial deference). The housing of Worrell, the allowing of Worrell to have access to the OBNDD's most sensitive information, and the obvious potential for disruption of having to work in close proximity to a person who had testified as an expert witness on behalf of a drug dealer who had murdered an OBNDD agent (who had been a friend of Turner and other agents), shows how volatile the situation would be. *Cf. Pickering v. Board of Education*, 391 U.S. 563, 570 (1968) (noting that letter to school

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[7]In its opinion in *Worrell*, the Tenth Circuit cited the earlier opinion in *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), but failed to note that after remand, the court applied the *Pickering/Connick* test to defeat the employee's § 1983 claim. *Andersen v. McCotter*, 205 F.3d 1214, 1217-19 (10th Cir. 2000). (App. A, *infra*, 13a).

board by teacher was protected by First Amendment where teacher's relationship with board and superintendent were "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.").

In the present case, for the Tenth Circuit to require Turner and other OBNDD agents to work with Worrell, especially when they had been warned by FBI agents of Worrell's unreliability, would be detrimental to drug enforcement, which is the most dangerous of any type of law enforcement. In its opinion in the present case, the Tenth Circuit failed to mention important facts that demonstrate the great negative impact that Worrell's presence on the OBNDD's premises would have. For example, the Tenth Circuit failed to note that Worrell was to be housed in the Ardmore office of the OBNDD. The Tenth Circuit also failed to note that the Ardmore OBNDD office is at a secret location, and the sign on the door is that of a fictitious business in order to maintain the confidentiality of OBNDD operations. The circuit also made no mention of the fact that, as the Director of the District Attorney's Drug Task Force, Respondent Worrell would have had access to all information in the possession of OBNDD, including OBNDD's central files in Oklahoma City, OBNDD raw intelligence files, and the names of OBNDD's informants. Finally, the fact that the FBI had provided to Turner information that showed Worrell's untrustworthiness and dislike by the FBI was never discussed in the Tenth Circuit's opinion.

These facts all support the *Pickering* rationale, with regard to interference with "close personal relationships," and support the OBNDD's contention that this defense should be available for use in cases such as the present, as it does in cases involving persons or entities who contract with, or desire to contract with, a

governmental entity. *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 714-19 (1996) (holding that a private entity that is a "regular provider of services" to the government is also entitled to First Amendment protection, and that the *Pickering* balancing test is to be used).

In applying the *Pickering* test to District Attorney Henry, the Tenth Circuit in *Worrell* stressed that "personal loyalty and confidence among employees are especially important in law enforcement" and even noted that Henry was entitled to take into account the emotional and negative reaction other employees might have to Worrell's employment given the history of the murder trial. (App. A. *infra*, 21a). But the court did not discuss the fact that it would have been the OBNDD's and Turner's workplace, and not that of Defendant Henry, where the disruption would occur.

Furthermore, unlike an employment scenario, in the present case the OBNDD had no role in the choosing of Worrell to be the District Attorney's Task Force Director. The only option the OBNDD had was to refuse to allow Worrell to work at the secret OBNDD location, and to refuse him access to OBNDD files.

If Turner and the OBNDD had shared their informant files with someone who had been characterized by the FBI as being "crazy" and who the FBI feared, and did not want anything to do with, and the informant had been harmed, it is obvious that OBNDD agents themselves could face a § 1983 lawsuit. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (liability under 42 U.S.C. § 1983 can be imposed against the police for conduct that "shocks the conscience").

The impact of the Tenth Circuit's ruling would extend beyond the OBNDD. For example, because of what the FBI had told

Turner about Worrell, it is obvious that the FBI also was not going to cooperate with or assist Worrell either. However, because of the holding in *Worrell*, these two FBI agents could also be sued in an action pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), under the First Amendment, for "failure to cooperate," and for the statements they made to Turner.[8] As was noted previously, Turner expressed his opinion only to the district attorney, Henry, and to the hierarchy of the OBNDD.

If the OBNDD was forced to house Worrell, could Worrell sue Turner if he believed that Turner was not providing the appropriate informant information in "retaliation" for court testimony that Worrell gave nearly nine years earlier? Could Worrell sue Turner, or other OBNDD agents, if Worrell believed that Turner was displaying a hostile or negative attitude toward him in the office space that they both occupied?[9] Are Turner, and other law enforcement agents, to face a federal jury trial every time these questions arise? And could a federal court issue injunctive relief requiring a requisite degree of cooperation or assistance by Turner, Atwood and Dodd and other OBNDD agents? These are questions could reasonably be raised in light of the Tenth Circuit's decision in this case:

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[8]It has been noted in this Petition that the Tenth Circuit criticized Turner for sharing information about Worrell that had been provided by the FBI.

[9]This is an obvious possibility because Turner and other OBNDD agents were personal friends and fellow agents of the murdered OBNDD agent Stewart.

II. THE OBNDD DEFENDANTS WERE IMPROPERLY DENIED THE QUALIFIED IMMUNITY DEFENSE, BECAUSE THE "FAILURE TO COOPERATE" CAUSE OF ACTION UNDER 42 U.S.C. § 1983 WAS NOT CLEARLY ESTABLISHED, AND BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT THE *PICKERING* TEST WOULD NOT APPLY IN A SITUATION THAT WAS ANALOGOUS TO AN EMPLOYMENT RELATIONSHIP.

The Petitioners have pointed out that this case involves new and serious issues for law enforcement, especially law enforcement officers who must rely on the extensive use of informants and confidential information. However, the Tenth Circuit ruled that the Petitioner Turner was not entitled to qualified immunity; this is despite the fact that the court's holdings constitute new jurisprudence under 42 U.S.C. § 1983.

There are several reasons why Turner, Dodd, and Atwood should be protected by the qualified immunity defense. First, the Tenth Circuit's holding that Turner, Dodd and Atwood could be held liable for "failure to cooperate" is unknown in any previous 42 U.S.C. § 1983 case. The Tenth Circuit cited no cases where that principle had been applied before by any circuit court of appeals. Therefore, this action by the OBNDD Defendants was not "clearly established" violations of federal constitutional or statutory law. For this reason, it was improper to deny Turner, Dodd and Atwood a qualified immunity defense. *Conn v. Gabbert*, 526 U.S. 286, 290-92 (1999) (timing of execution of search warrant of attorney was not a clearly established violation of federal law).

Second, the Tenth Circuit held that Henry, the District Attorney who was to be the employer of Worrell, was entitled to a *Pickering* defense, while Turner, a non-employer, was not. Surely

the distinction between the two roles played by Turner and Henry was not clearly established in a way that should deprive Turner of the qualified immunity defense. *Cf. Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (the contour of the right must be sufficiently clear that a reasonable official would understand what he or she is doing violates that right before the qualified immunity defense is withheld). Turner, Dodd and Atwood could not have anticipated that the refusal to allow Worrell to be housed on OBNDD premises, and to have access to its files, violated clearly established law. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999) (federal agents were entitled to qualified immunity, even though their actions violated the Fourth Amendment, where the right violated was not clearly established at the time).

Additionally, the fact that the Petitioners Turner, Dodd and Atwood are faced with a situation where they are now prohibited from using the *Pickering* balancing test, means that this rule was not clearly established, and they should be entitled to qualified immunity. It was noted above that in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 673 (1996) and *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 719 (1996), this Court held that the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), should be applied with regard to contractors, as well as employers.

The fact that Worrell's situation would be analogous to that of an employee means that it was not clearly established that *Pickering* would not be applied. In *Umbehr v. McClure*, 44 F.3d 876, 882-83 (10th Cir. 1995), *aff'd*, 518 U.S. 668 (1996), the court cited the case of *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1381 (8th Cir. 1989), which held that the *Pickering/Connick* test was properly applied in case regarding surgeon staff privileges because of right of public hospital to regulate its medical staff in order to

insure the delivery of adequate medical care to it patients.

In the present case, the Tenth Circuit held that, rather than *Pickering*, a test devised by the Eighth Circuit in *Helvey v. City of Maplewood*, 154 F.3d 841 (8th Cir. 1998) would apply. (App. A, *infra*, 30a). Although this test had never been previously applied by the Tenth Circuit, and despite the fact that *Helvey* was decided after the actions that occurred, the Tenth Circuit held that Petitioner Turner was not entitled to qualified immunity.

In the present case, in denying the qualified immunity defense to Turner, the Tenth Circuit also cited *Melton v. City of Oklahoma City*, 879 F.2d 706, *on reh'g*, 928 F.2d 920 (10th Cir. 1991). (App. A, *infra*, 37a-38a). However, *Melton* used the *Pickering* weighing test. The Tenth Circuit also cited its opinion in *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), but failed to note that, after remand, the court applied the *Pickering/Connick* test to defeat the employee's § 1983 claim. *Andersen v. McCotter*, 205 F.3d 1214, 1217-19 (10th Cir. 2000).

III. THE TENTH CIRCUIT'S OPINION CREATED A NEW CAUSE OF ACTION UNDER 42 U.S.C. § 1983, ONE WHICH IMPOSES LIABILITY UPON LAW ENFORCEMENT OFFICERS WHO CONDUCT "BAD FAITH INVESTIGATIONS"; THEREFORE, LAW ENFORCEMENT OFFICIALS IN THE TENTH CIRCUIT WILL NOT BE ENTITLED TO QUALIFIED IMMUNITY IN ACTIONS BROUGHT PURSUANT TO 42 U.S.C. § 1983 WHERE THERE IS AN ALLEGATION THAT THEY ENGAGED IN "BAD FAITH INVESTIGATIONS"; THIS CONFLICTS WITH THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION THAT HELD THAT THERE IS NO CONSTITUTIONAL RIGHT TO BE FREE OF INVESTIGATION.

In addition to the creation of a cause of action under 42 U.S.C. § 1983 for "refusing to cooperate," the Tenth Circuit's decision subjects law enforcement to even greater dangers than those noted above. The Tenth Circuit stated that because of the unpublished opinion in *Lackey v. County of Bernalillo*, No. 97-2265, 1999 WL 2461, at **3 (10th Cir. Jan. 5, 1999), there is a cause of action under 42 U.S.C. § 1983 for "`[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, *bad faith investigation*, and legal harassment . . . ." (emphasis added). (App. A, *infra*, 31a). However, the reliance on *Lackey* as precedent is based on an underlying flaw in that case. This is because *Lackey* cites two courts of appeals decisions, *Smart v. Board of Trustees*, 34 F.3d 432, 434 (7th Cir. 1994) (Posner, J.), and *Reporters Committee for Freedom of the Press v. AT&T Corp.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978), but neither of those cases holds or suggests that § 1983 provides a claim for a "bad faith investigation."[10] However, because of the Tenth Circuit's decision in the present case, there now exists a claim under § 1983 in the Tenth Circuit for both failure to cooperate or assist, and for bad faith investigation.

The Tenth Circuit's decision extends First Amendment protection against discrimination or retaliation to all actions concerning an alleged failure to cooperate, or failure to assist, or to a "bad faith" investigation, but denies *Pickering's* protection to those affected government entities. This would cause tremendous problems for law enforcement entities. A drug dealer who hears that he is being investigated by narcotics agents could merely make

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[10]Furthermore, in *Lackey*, there was no commonality of workplace between the deputy sheriff and the local police department. The present case is totally different, since Worrell would have been housed with the OBNDD and would have had access to their confidential files.

a public statement criticizing those agents, and then claim that he is being subjected to a "bad faith investigation." The Tenth Circuit's decision in this case creates new causes of action under 42 U.S.C. § 1983 for alleged retaliation for the exercise of First Amendment rights for conducting a "bad faith investigation." No other court of appeals has held that such a claim exists under 42 U.S.C. § 1983. Furthermore, the Tenth Circuit's opinion in *Worrell* conflicts with that the Court of Appeals of the District of Columbia in *Sloan v. Department of Housing & Urban Development*, 231 F.3d 10, 18 (D.C. Cir. 2000), where that court held that "there is no constitutional right to be free of investigation." *See also United States v. Trayer*, 898 F.3d 805, 808 (D.C. Cir. 1990) (no fourth amendment violation with regard to the reasonableness of the police's targeting defendant for investigation).

Even more troubling, because of *Worrell*, it is now clearly established law in the Tenth Circuit that a "bad faith investigation" violates federal constitutional law. *See Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000) (holding that, when determining whether a right is "clearly established," the court must look first at the decisions of the Supreme Court, then to decisions of that circuit, and finally to decisions of other circuits). Therefore, a § 1983 complaint that alleges that the plaintiff has been the victim of a "bad faith investigation" as alleged retaliation for the exercise of free speech, will have stated a violation of clearly established law, and the law enforcement official who has been sued will not be entitled to a qualified immunity defense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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